BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES ROBERT WILSON, II Claimant	)	
VS.	)	Docket No. 1,043,532
CITY OF TOPEKA Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the November 4, 2010, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. James B. Biggs, of Topeka, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant's original work-related injury never healed and, therefore, his subsequent re-injury was a natural consequence of the original injury. Accordingly, the ALJ ordered respondent to pay claimant temporary total disability benefits, medical treatment with Dr. Munns, and medical bills set out as exhibits 3 through 7 in the preliminary hearing transcript.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 2, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends claimant did not prove that his intervening accident and re-injury of his right knee was caused by or was the natural and probable consequence of his original work-related injury. Respondent argues, instead, that claimant's second accident and re-injury was a new and separate noncompensable accident.

Claimant contends that his right knee had not healed from his original injury and that on July 30, 2008, his right knee buckled, causing him to fall on his right knee and re-tear his anterior cruciate ligament (ACL) and medial meniscus. Claimant argues, therefore, that his subsequent injury was a natural consequence of his original work-related accident.

The issue for the Board's review is: Was claimant's intervening injury in July 2008 a new and separate non-work-related accident or a natural consequence of his original work-related injury suffered in February 2008?

FINDINGS OF FACT

Claimant was employed by respondent as a police officer. On February 15, 2008, he was injured when he was running down some steps to his patrol car to answer a call received over the police radio. As he ran down the steps, he heard a pop and his right knee blew out. He fell the rest of the way down the stairs, landing on the sidewalk. Claimant's injuries consisted of a torn ACL and medial meniscus on the right, a fractured right ankle, and a fractured right tibia plateau.

Dr. Bradley Poole performed reconstructive surgery to claimant's right knee on March 11, 2008. About two months after the surgery, claimant returned to light duty work. During that time, claimant was in physical therapy. Claimant testified that after his surgery, while he was undergoing physical therapy, he was still having problems with his right knee. He was having pain and swelling, and his knee would catch and buckle. He was experiencing giving out and buckling of his right knee as late as May 29, 2008.[1] Claimant said he told his therapists about the pain, swelling, and buckling.

Claimant went back to Dr. Poole for follow-up visits following the March 2008 surgery. According to Dr. Poole's report on June 12, 2008, claimant had a "rock solid"[2] ACL and his anterior and posterior drawer examinations were solid as well. Claimant testified he told Dr. Poole at that time that he was still having pain and swelling, and Dr. Poole told him to give it more time. Claimant saw Dr. Poole again on July 7, 2008. Dr. Poole's records note that there was no swelling in claimant's knee and his Lachman's examination was good. The records also note that claimant had some hamstring tightness laterally. Claimant's knee was improving after the March 2008 surgery, but Dr. Poole continued his physical therapy and gave him a prescription for pain medication. Claimant testified that Dr. Poole told him that typically ACL recovery time is anywhere from six months to a year. Claimant complained about his knee problems to the physical therapist up to the time of his July 2008 re-injury.[3]

On July 30, 2008, claimant came home from work. Claimant testified that as he walked from his vehicle through the garage to get into the house, his right knee buckled and he slipped on some water on the floor and fell. In doing so, he landed on his right knee and re-tore his right ACL and meniscus.

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[1] P.H. Trans. at 33.

[2] P.H. Trans. at 29, Resp. Ex. A at 6.

[3] P.H. Trans., Cl. Ex. 3.

On July 31, 2008, claimant was seen by Dr. Donald Mead at St. Francis Health Center (St. Francis). St. Francis' records indicate that claimant said he had slipped and landed on his right knee. The notes from claimant's physical therapist of July 31, 2008, also indicate that claimant reported that he had slipped and came down hard on his right knee. Claimant saw Dr. Poole again on August 4, 2008. Dr. Poole's notes indicate that claimant gave a history of having slipped in his garage and falling on a hyper flexed right knee. Claimant testified he told his medical providers that his right knee had buckled, but he had no control over how they recorded his history.

Since the accident in July 2008, claimant has had four revisionary surgeries on his right knee, one in August 2008 performed by Dr. Poole, another in December 2009 performed by Dr. Stephen Munns at the KU Medical Center, another in June 2010, performed by Dr. Munns, and the last on October 11, 2010, also performed by Dr. Munns.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[5]

In *Logsdon*,[6] the Kansas Court of Appeals held:

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[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

[5] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.,* 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes,* 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[6] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The ALJ determined that claimant's original injury never healed and, citing *Logsdon*, held the subsequent re-injury to be the natural consequence of the original injury. This case is factually similar to *Logsdon* in that claimant aggravated his prior work-related injury when he slipped and fell. And at the time of their slip and fall accidents, the claimants were still symptomatic from their original work-related injuries. However, in *Logsdon*, there was medical evidence that Mr. Logsdon would not have sustained the injury from such a trivial trauma but for the prior injury. There is no similar expert medical opinion in this case. To the contrary, it appears that this claimant's accident of July 30, 2008, resulted in a significant trauma to claimant's knee, one that seemingly could have been capable of causing the resultant injuries in a normal knee. Thus, claimant's injuries could have resulted from the accident of July 30, 2008, even absent claimant's prior injury and preexisting condition that may not have been fully healed. No physician has opined that absent the weakened condition of claimant's knee from the prior injuries suffered on February 15, 2008, the new injuries likely would not have occurred. Based on the record presented to date, it is probable that claimant's July 30, 2008, accident was the cause of claimant's present injuries.

Dr. Munns relates claimant's need for the treatment beginning August 2008 to the February 15, 2008, work injury because the symptoms claimant was experiencing "after August 26th"[9] were similar to the symptoms claimant had experienced before. However, this could also be explained by the fact that claimant injured the same parts of his knee in both accidents. Moreover, the history Dr. Munns was provided was that "in May of 2009 [claimant] had acute worsening of his right knee symptoms after a mild episode of

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2009 Supp. 44-555c(k).

[9] P.H. Trans., Ex. 1 at 3.

walking."[10] There is no mention of the July 30, 2008, slip and fall accident. Therefore, Dr. Munns' causation opinion carries little weight.

Claimant argues that his July 30, 2008, fall was not just the result of his stepping in water and slipping but that his knee buckled and this caused or contributed to his fall. This description of the accident is not borne out by the contemporaneous medical records. The histories contained in the records of both Dr. Mead and Dr. Poole, as well as the physical therapy notes, contain a description of a slip and fall with no mention of the knee giving way or buckling. While these medical records could be inaccurate or incomplete, it is unlikely that all three would agree on the mechanism of injury yet omit the same detail that claimant now asserts he related to all three health care providers.

CONCLUSION

Claimant has failed to prove that his July 30, 2008, accident was a direct and natural consequence of his February 15, 2008, work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated November 4, 2010, is reversed.

IT IS SO ORDERED.

Dated this _____ day of February, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James B. Biggs, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge

[10] P.H. Trans., Ex. 1 at 1.